Supreme Court, U.S.
FILED

051095 FEB 21 2006

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No. 05-

IN THE

Supreme Court of the United States

INDIANA WATER QUALITY COALITION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Environmental Protection Agency ("EPA") regulation 40 C.F.R. § 132.4(h) ("section 132.4(h)") applies to "any pollutant other than those in Table 5" of 40 C.F.R. part 132. Contrary to the plain language of the regulation, EPA *de facto* amended section 132.4(h) via an informal guidance document and the preamble of a proposed rule to limit the regulation's scope to only those pollutants identified in the future, thereby excluding all currently identified pollutants. EPA applied its own restrictive interpretation to disapprove the State of Indiana's use of section 132.4(h) to regulate the currently identified pollutant whole effluent toxicity ("WET"). The Sixth Circuit accepted EPA's restrictive interpretation of section 132.4(h) — in square conflict with long-established regulatory principles established by Supreme Court and federal circuit court precedent, as well as the plain language of section 132.4(h) itself.

The question presented is:

Whether an agency interpretation limiting the scope of a regulation is entitled to deference where it is contrary to the unambiguous language of the regulation.

PARTIES TO PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Indiana Water Quality Coalition ("IWQC") is the Petitioner in this case. The United States Environmental Protection Agency ("EPA") is the Respondent in this case. IWQC originally filed its Petition for Review in the Seventh Circuit. On April 11, 2001, the Seventh Circuit transferred IWQC's Petition for Review to the Sixth Circuit. On May 15, 2001, the Sixth Circuit accepted the transfer, and consolidated IWQC's Petition with a Petition for Review filed on behalf of the Northeast Ohio Regional Sewer District; the City of Cincinnati, Ohio; the City of Akron, Ohio; the City of Columbus, Ohio; and the City of Toledo, Ohio. None of these parties are involved with this petition for a writ of certiorari.

IWQC does not have a parent corporation, and there is no publicly held company that owns 10% or more of IWQC's stock.

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Petitioner Indiana Water Quality Coalition ("IWQC") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals of the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit denying IWQC's Petition for Review is reported at 411 F.3d 726. The opinion is reproduced in the appendix hereto ("App.") at 1a. The opinion of the Sixth Circuit denying IWQC's Petition for Rehearing with Suggestion for Rehearing En Banc is not reported, and is reproduced at App. 17a. EPA's *Identification of Approved and Disapproved Elements of the Great Lakes Guidance Submissions From the States of Michigan, Ohio, Indiana, and Illinois, and Final Rule* is reported at 65 Fed. Reg. 47,864, and is reproduced at App. 19a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit denied IWQC's Petition for Review on June 16, 2005. App. at 1a. The Sixth Circuit denied IWQC's timely filed Petition for Rehearing with Suggestion for Rehearing En Banc on November 22, 2005. App. at 17a. The jurisdiction of the Sixth Circuit was based on 33 U.S.C. § 1369(b)(1)(C), (D), & (E). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Section 118 of the Clean Water Act provides in pertinent part:

> (c) Great Lakes management.
>
> . . .
>
> (2) Great Lakes water quality guidance.
>
> (A) By June 30, 1991, the Administrator, after consultation with the Program Office, shall publish in the Federal Register for public notice and comment proposed water quality guidance for the Great Lakes System. Such guidance shall conform with the objectives and provisions of the Great Lakes Water Quality Agreement, shall be no less restrictive than the provisions of this Act [*33 USCS §§ 1251* et seq.] and national water quality criteria and guidance, shall specify numerical limits on pollutants in ambient Great Lakes waters to protect human health, aquatic life, and wildlife, and shall provide guidance to the Great Lakes States on minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System.
>
> . . .
>
> (C) Within two years after such Great Lakes guidance is published, the Great Lakes States shall

adopt water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System which are consistent with such guidance. If a Great Lakes State fails to adopt such standards, policies, and procedures, the Administrator shall promulgate them not later than the end of such two-year period. When reviewing any Great Lakes State's water quality plan, the agency shall consider the extent to which the State has complied with the Great Lakes guidance issued pursuant to this section. [33 U.S.C. § 1268(c)(2)(A) & (C)]

40 C.F.R. § 132.4(h) provides:

For any pollutant other than those in Table 5 of this part for which the State or Tribe demonstrates that a methodology or procedure in this part is not scientifically defensible, the Great Lakes States and Tribes shall:

(1) Apply an alternative methodology or procedure acceptable under 40 C.F.R. part 131 when developing water quality criteria; or

(2) Apply an alternative implementation procedure that is consistent with all applicable Federal, State, and Tribal laws.

STATEMENT OF THE CASE

Facts. This case arose under the Clean Water Act (33 U.S.C. § 1251, *et seq.*), the purpose of which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To this end, Congress enacted the Great Lakes Critical Programs Act of 1990, which amended section 118 of the Clean Water Act. As amended, section 118 provides that EPA shall adopt guidance for Great Lakes States[1] on minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System.[2] 33 U.S.C. § 1268(c)(2)(A). On April 16, 1993, EPA published a *Proposed Water Quality Guidance for the Great Lakes System* (58 Fed. Reg. 20,802) (the "Proposed Guidance"). The purpose of the Proposed Guidance was to provide "opportunity for comment on the proposed Water Quality Guidance for the Great Lakes System . . . developed under section 118(c)(2) of the Clean Water Act . . ." 58 Fed. Reg. at 20,802.

The preamble for the Proposed Guidance provided that Great Lakes States were required to apply EPA's methodologies for implementing the eventual final guidance "except for the 16 pollutants listed in Table 5 [of the Proposed Guidance] and any pollutant other than those in Table 5 for

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1. Section 118(a)(3)(G) of the Clean Water Act defines "Great Lakes States" to include Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin. 33 U.S.C. § 1268(a)(3)(G).

2. Section 118(a)(3)(C) of the Clean Water Act defines "Great Lakes System" as "all the streams, rivers, lakes, and other bodies of water within the drainage basin of the Great Lakes." 33 U.S.C. § 1268(a)(3)(C).